

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

ANTHONY BRIAN WHETSTONE,

Movant,

v.

CIVIL ACTION NO.

1:13-cv-3446-WSD

CRIMINAL ACTION NO.

1:09-cr-216-1-WSD

UNITED STATES OF AMERICA,

Respondent.

ORDER

This matter is before the Court on Magistrate Judge E. Clayton Scofield's Final Report and Recommendation [155] ("R&R") on Movant Anthony Brian Whetstone's ("Whetstone") Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 and Demand for Evidentiary Hearing [151] ("Motion to Vacate").

I. BACKGROUND¹

In May 2010, Whetstone pleaded guilty to robbery affecting interstate commerce, to the use of a firearm during a crime of violence, and to armed bank robbery. He was sentenced to a term of imprisonment of 425 months.

In May 2012, Whetstone filed a motion under 28 U.S.C. § 2255 to vacate his sentence, alleging ineffective assistance of counsel. On November 15, 2012, the Magistrate Judge recommended (i) that the criminal judgment against Whetstone be vacated; (ii) that the criminal sentence be reimposed; (iii) that he be advised of his right to direct appeal; and (iv) that he be advised of the time for filing a notice of appeal.² On November 30, 2012, Whetstone filed a “Cancellation of Civil Action,” which the Court construed as a voluntary withdrawal of the § 2255 motion. The Court dismissed the construed § 2255 action without prejudice.

On October 15, 2013, Whetstone submitted his Motion to Vacate, arguing that his sentence should be vacated and that he should be released from custody

¹ The facts are taken from the R&R and the record. The parties have not objected to any facts set out in the R&R, and finding no plain error in the Magistrate Judge’s findings, the Court adopts them. See Garvey v. Vaughn, 993 F.2d 776, 779 n.9 (11th Cir. 1993).

² Whetstone’s direct appeal was dismissed because his appellate counsel failed to submit the required record excerpts.

pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure.³ On October 29, 2013, the Magistrate Judge issued his R&R, recommending that Whetstone's motion be denied pursuant to 28 U.S.C. § 1915A. Whetstone did not object to the R&R.

II. DISCUSSION

A. Legal Standard

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Crim. P. 59; Williams v. Wainwright, 681 F.2d 732, 732 (11th Cir. 1982), cert. denied, 459 U.S. 1112 (1983). A district judge "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). This requires that the district judge "give fresh consideration to those issues to which specific objection has been made by a party." Jeffrey S. v. State Bd. of Educ. of Ga., 896 F.2d 507, 512 (11th Cir. 1990) (internal quotation marks omitted). With respect to those findings and

³ Defendant expressly disclaims in his Motion to Vacate that he is seeking relief under § 2255. The Magistrate Judge found that Defendant is time-barred from seeking § 2255 relief. See 28 U.S.C. § 2255(f). The Magistrate Judge recommended that Defendant's Motion not be construed as a § 2255 petition, and the Court finds no plain error in this recommendation.

recommendations to which objections have not been asserted, the Court must conduct a plain error review of the record. United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983), cert. denied, 464 U.S. 1050 (1984). There are no objections to the findings and conclusions in the R&R, and the Court reviews them for plain error.

B. Analysis

The Magistrate Judge determined that Whetstone's contentions, including that he was prosecuted in an "imposter administrative court," are frivolous, unfounded, and nonsensical. The Court agrees. The Magistrate Judge recommended that the Motion be denied, and the Court finds no plain error in this recommendation. The Magistrate Judge also determined that there is no good faith basis upon which Whetstone can appeal this action. See 28 U.S.C. § 1915A(b)(1) ("On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted[.]"); 28 U.S.C. § 1915(a)(3) ("An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.").

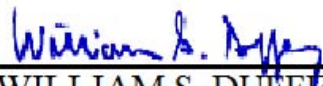
III. CONCLUSION

Accordingly, for the foregoing reasons,

IT IS HEREBY ORDERED that Magistrate Judge E. Clayton Scofield's Final Report and Recommendation [155] is **ADOPTED**, and Movant Anthony Brian Whetstone's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 and Demand for Evidentiary Hearing [151] is **DENIED**.

IT IS FURTHER ORDERED that the Court **CERTIFIES** that Movant may not appeal this Order *in forma pauperis*.

SO ORDERED this 4th day of June, 2014.



WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE